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IN THE

Supreme Court of the United States

October Term, 1964.

No. 1068.

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,
and
HONORABLE JOSEPH S. LORD, III, District Judge,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS OTHER THAN HON. JOSEPH S. LORD, III IN OPPOSITION.

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HONORABLE JOSEPH S. LORD, III, DISTRICT JUDGE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS OTHER THAN HON. JOSEPH S. LORD, III IN OPPOSITION.

QUESTION PRESENTED.

Did the Court of Appeals err in refusing to review, by the extraordinary Writ of Mandamus or by a Rule to Show Cause, the interlocutory order of the District Court transferring related electrical equipment antitrust actions to another district in which there were pending other related actions arising out of the same conspiracy and part of the same National Discovery Program, where the District Court's order was made after submission of briefs, affidavits and after hearing at which the plaintiffs supported the transfer as being for the convenience of the parties and witnesses and in the interests of justice?

STATEMENT OF THE CASE.

The actions transferred by the United States District Court for the Eastern District of Pennsylvania were filed by the various respondents in the period from June 23, 1961 to February 5, 1962, and alleged that five defendants, including petitioner I-T-E Circuit Breaker Company, were engaged in a conspiracy to violate the antitrust laws in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1, with respect to power switchgear assemblies. Pursuant to the National Discovery Program in the electrical equipment antitrust cases, the Coordinating Committee for Multiple Litigation of the United States District Courts, appointed by Chief Justice Warren in January, 1962, recommended a series of national discovery orders which were entered in the Eastern District of Pennsylvania and approximately thirty other Districts in which related actions were pending, including the Northern District of Illinois. Documents relating to power switchgear assemblies were produced by defendants, including I-T-E, at the defendants' national depository in Chicago. I-T-E admits that file drawers of its documents relating to these cases are now in Chicago (27a [1]). Intensive preparation for the trial of a power switchgear assembly case has been proceeding in the Northern District of Illinois. Cases involving other product lines have been tried in the Eastern District of Pennsylvania and elsewhere.

Plaintiffs did not oppose the entry of the transfer order, and on the contrary, at the hearing before the District Court on February 19, presented numerous arguments why the proposed transfer met the statutory criteria of 28 U. S. C. § 1404(a) as being "for the convenience of parties and witnesses, in the interest of justice". Plaintiffs argued that the time of counsel and witnesses would

1. References to "a" pages are to the appendices to the Petition for either a Rule to Show Cause or a Writ of Mandamus in the Court of Appeals filed by petitioner as the record herein.

be saved by consolidating discovery with the actions pending in Chicago and that transfer would make possible a consolidated trial procedure at least on the issue of liability which would be in the interest of justice. (Appendix A to this Answer.)

Two power switchgear assembly cases were similarly transferred to the Northern District of Illinois by order of the United States District Court for the Western District of Missouri (28a) and I-T-E's Application for a Writ of Mandamus to the United States Court of Appeals for the Eighth Circuit was denied by that Court on March 29, 1965, with an accompanying opinion in which the Court found that the transfer satisfied the statutory requirements.[2] Other transfers have also been made from the Southern District of Texas and the Western District of Kentucky.

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2. As the Court of Appeals for the Eighth Circuit commented, "What it [petitioner] seemingly wants done is simply to have all the [581] suits against it left alone." *I-T-E Circuit Breaker Co. v. Becker,* 1965 Trade Cases ¶ 71,406.

ARGUMENT.

Since the institution of the civil antitrust suits arising out of the electrical equipment cases, there have been at least seven Petitions for Certiorari presented to and denied by this Court with respect to interlocutory orders involving the discretion of the District Courts.[3]

Where the District Court had jurisdiction over the subject matter and the parties, mandamus does not lie to review a decision of the lower Court transferring an action to another district even if the decision of the lower court were to involve an erroneous construction of the law. *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379. The writ is not to be used as a substitute for appeal. *Ex parte Fahey,* 332 U. S. 258, 259-260. Although a party may claim hardship in being compelled to proceed to trial in advance of a review of the court's action, this does not justify issuance of the writ of mandamus. *Roche v. Evaporated Milk Association,* 319 U. S. 21, 31.

Petitioner does not contend it has been denied procedural due process by absence of notice, hearing, or the opportunity to be heard, such as justified mandamus in *Swindell-Dressler Corp. v. Dumbauld,* 308 F. 2d 267 (3rd Cir. 1962). On the contrary, it is evident that the petitioner was afforded the fullest opportunity to present its contentions in an adversary proceeding in which the re-

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3. *Pennsylvania Public Utility Commission v. Westinghouse Electric Company,* cert. denied March 4, 1963, 372 U. S. 936; *General Electric Company v. Honorable William H. Kirkpatrick,* cert. denied March 18, 1963, 372 U. S. 943; *A. B. Chance Co. v. Atlantic City Electric Company,* stay pending certiorari denied April 10, 1963, 10 L. ed. 2d 122, 83 S. Ct. 964; *General Electric Company v. Atlantic City Electric Company,* cert. denied May 13, 1963, 373 U. S. 909; *Federal Pacific Electric Company v. Kansas City,* cert. denied May 13, 1963, 373 U. S. 914; *General Electric Company v. Public Service Company of New Mexico,* cert. denied June 10, 1963, 374 U. S. 809; *Illinois v. Commonwealth Edison Co.,* cert. denied Oct. 14, 1963, 375 U. S. 834.

spondents similarly presented the reasons supporting transfer. Nor does or can petitioner deny that the Northern District of Illinois is a district in which the action might have been brought. Basically petitioner's complaint is only that it disagrees with the conclusion reached by the District Court after the hearing at which the opposing views were presented and it seeks to have this Court substitute its judgment or to require the Court of Appeals to substitute its judgment for the discretionary action taken by the District Court Judge before whom the parties had presented all of the relevant factors.

Such an interpretation would make every transfer order the subject of interlocutory review and would frustrate the congressional policy against piecemeal appeals. *Parr v. United States*, 351 U. S. 513, 520-21.[4]

I-T-E's contention that the transfer order is fatally defective because of the absence from the Court's order of the magic words "for the convenience of parties and witnesses" is patently trivial. There is no requirement that the District Court parrot by rote the statutory language, and the statutory requirements have been amply satisfied when the Court gives the parties the opportunity to present their opposing viewpoints which it then considers in exercising its discretion. The District Court is under no obligation to make any findings of fact or conclusions of law in connection with a motion to transfer (Federal Rules of Civil Procedure, Rule 52(a)), and in the absence of persuasive evidence to the contrary, the appellate courts cannot assume the District Court failed to exercise its discretion in accordance with the statutory requirements.

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4. In the extraordinary case in which an interlocutory appeal from an order granting or denying transfer is appropriate, the Interlocutory Appeals Act would provide a remedy. 28 U. S. C. 1292(b). This was the appellate route followed in *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19. The District Court in this case determined that this was not such an appropriate case and denied certification. The new Rule to Show Cause procedure referred to in the alternative by petitioner is merely a substitute for mandamus; thus the same criteria would apply.

In any event, the record clearly justifies the action of the District Court. Section 1404(a) was designed to prevent "the wastefulness of time, energy and money" that accompanies the simultaneous pending in two District Courts of two cases involving precisely the same issues. *Continental Grain Company v. Barge FBL—585,* 364 U. S. 19, 26. Substantially the same witnesses must be called in the determination of liability for all power switchgear assembly claims and consolidated discovery or consolidated trial on liability would protect litigants, witnesses and the public against unnecessary inconvenience and expense.

Many Courts have held that the pendency of a similar action in another District Court is a factor in supporting transfer of the action under Section 1404(a).[5] Section 1404(a) can be regarded as a federal judicial housekeeping measure which is intended to authorize a change of courtrooms on the basis of convenience and fairness. *Van Dusen v. Barrack,* 376 U. S. 612, 636-637.

There is no authority in this Court which would preclude transfer to another district when some of the parties to the action contend that they, the witnesses and the courts will be convenienced by such an order, and the record supports that contention and patently discloses that such a move is in the interests of wise judicial economy. Such a transfer is in accordance with the remedial intent of Section 1404(a). *Continental Grain Co. v. Barge FBL—585,* 364 U. S. 19.

CONCLUSION.

It is precisely because the order below is only one facet of the most complex multiple district litigation to reach the federal courts that interlocutory review should be denied.

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5. *Roberts v. Kurtz,* 236 F. Supp. 471 (D. N. J. 1964); *Rodgers v. Northwest Airlines, Inc.,* 202 F. Supp. 309, 312 (S. D. N. Y. 1962); *Winsor v. United Air Lines,* 153 F. Supp. 244 (E. D. N. Y. 1957); *Aircraft Marine Products, Inc. v. Burndy Engineering Co.,* 96 F. Supp. 588, 593 (S. D. Cal. 1951).

The district judges, aided by the Coordinating Committee for Multiple Litigation, have performed a strikingly successful task of coordinating the pre-trial procedures so that the entire federal judicial system has avoided the entanglements in which more than 1800 electrical equipment treble damage suits could have been enmeshed. Review at this stage of the litigation would only encourage a deluge of other applications to the appellate courts by each party claiming to be aggrieved by some discretionary order of the district court. The transfer of the cases was within the power of the District Court, which exercised its discretion in accordance with the clear language of the statute and precedents of this Court.

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Excerpts From Transcript of Hearing February 19, 1965 Before the United States District Court for the Eastern District of Pennsylvania.

(19)

Mr. Kohn: If Your Honor please, in view of Mr. Price's presentation I do feel obliged to say a few things on this record in favor of this proposed transfer.

We certainly don't favor any Castro technique for the administration of justice or what is euphemistically called justice.

(20)

On the other hand, there is another extreme which can be just as bad and I think in a sense what Mr. Price would urge upon you is that other extreme.

Now, I don't see how anybody can seriously say that it is not in the interest of justice, that it is not for the convenience of the parties and witnesses, to have one trial of the same issue instead of seventeen or 117 trials of the same issue.

Why should the same witnesses be taken to Chicago and be taken to Philadelphia? Why should people have to go through the same thing twice, seventeen times or 117 times?

It is certainly to the manifest interest of his own client to have his own witnesses heard just once instead of again and again and again. Do we have to sit in courts everywhere in the United States and spend three weeks or three months reading depositions into the record again and again and again?

We had the same experience in the power transformer case, for example. We went through two and a half months more of it here. Then some poor fellow in Kansas City

had to go through the same thing all over again with the same result. How could anybody possibly argue that anybody was convenienced by that procedure or that anything in the

(21)

interest of the administration of justice was acomplished, so I think manifestly right on the face of it there is no clearer situation for a transfer in the interest of the administration of justice.

Certainly these people, these people representing these same defendants, when they think they can drag some poor widow whose husband was killed in an airline crash to some other city, they don't hesitate to say that it is in the interest of justice there to have one trial, but here where they have plaintiffs who are capable of conducting the case in a joint fashion in some other city, then they become violently opposed to it.

Now, there is going to be no great confusion out there. I don't see why, for example, there cannot be a single trial on the issue of liability as we have proposed in our memorandum, and I think actually there may never be an occasion for any trial because if this case is transferred we would propose to file a motion for summary judgment on the issue of liability, because I think certainly having had these cases tried now and similar cases tried in three or four different places now, with a uniform result, and having seen what happens, I think it is just a burden on the judicial system of this country to go through another three or four months' trial when the result is a foregone conclusion

(22)

and the record in this case, when these people themselves, I-T-E, say there was a conspiracy, that they were coerced into. Well, coerced or uncoerced there was a conspiracy and just as in the airplane crash case there was here one product, one conspiracy and a number of plaintiffs.

You will remember, for example, in the power transformer case the bulk of their evidence wasn't confined to Philadelphia. They had these laborious charts that kept on crowning Mr. Sawyer and myself, you remember, which contained purchases by everybody all over the country, sales. I mean they talk about the tremendous volume of paper they are going to have, the tremendous number of sales they will have to keep track of. You remember, they had sales not only from the defendants in that case to the plaintiffs in that case, but by the defendants in that case to all purchasers and by other manufacturers.

You will remember, they even had the sales by European manufacturers contained in the data which was on those charts, sales to people who weren't even involved in the remotest way in that case.

You will remember the National Analyst run that they had, that tremendous mass of data that we fought to get and finally got at the very end of the case in which they had sales by these defendants to everybody in the country.

(23)

So I don't think they simplify anything by chopping this up and causing confusion not in one court but confusion in two or more courts.

Now, just one or two other matters. I don't see what the relevance is of the reference in Mr. Judson's affidavit supplied by Mr. Price to certain conflicts which he refers to between the public and private power segments of the electric industry, but whatever conflicts there may be on those issues we are all agreed, and I think the facts sustain our argument, that there was a conspiracy in which public and private power producers alike were defrauded by these people, and all we want is, in the shortest, most expeditious manner, to get back what one of my clients has referred to as the ill-gotten gains which these defendants have obtained from us.

Then finally he includes a reference to the fact that Commonwealth Edison, PE, and certain other companies have made certain amounts of money or have certain revenues. I was under the impression that rich or poor, you had a right to get justice in the courts of the United States, and it was of no moment that a particular plaintiff was solvent. If we are going to engage in that sort of irrelevancy I would simply like to submit for this record, since it has been opened by the defendant, a series of clippings from the local

(24)

papers, supplied to them, I have no doubt, by the defendants, in which they talk about I-T-E's tremendous profit spurt in the last year and the increase of their dividends, and I think perhaps the record will then be completely irrelevant, both from him and myself.

(Photostatic copy of newspaper clippings marked Plaintiffs' Exhibit A for identification.)

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(25)

Seriously, the judges of the United States have made the first two, what I call tentative steps toward an efficient administration of the multiple litigation problem, first in the national discovery and now in this move, and I think it would be a horribly retrogressive step if the judges, having gone forward this far, would now withdraw and step back and not have this kind of transfer and endeavor to dispose of these cases at one time.

(26)

My opposition, such as it has been throughout to this national discovery program or to transfer, has always been on the basis of the fact that there would be delays because

all of these people trying to get together would be unable to agree on dates, things would be postponed, and I could move my own cases along faster. I still think I could probably do that, but whether I can move my cases along is not the sole criterion. There is a much more important problem, whether all the cases could be moved along, and I think this certainly was manifested by what ultimately happened in the national discovery. It moved all those cases along a good deal faster, and if we could take national depositions involving hundreds of plaintiffs, and those depositions are the guts of the trial, there is no reason to disperse that which was done in a uniform fashion and take those national depositions and introduce them in two, three, four or seventeen places.

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